IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1052 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

YATISHRI LALCHANDBHAI JAIN VANIK INN

Versus

HEIRS OF DECD. HIMMATSANGH KANJIBHAI

Appearance:

1. Civil Revision Application No. 1052 of 2002

MR HRIDAY BUCH for Petitioner No. 1-1/3

..... for Respondent No. 1

MR KD VASAVADA for Respondent No. 1/1

DS AFF.NOT FILED (R) for Respondent No. 1/1-1/2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 07/07/2004

ORAL JUDGEMENT

1. The matter came to be adjourned for 33 times. The record satisfactorily discloses that respondents are duly served. For respondents learned Advocate Mr. K.D.Vasavada appears, as per the record, but neither learned Advocate nor respondents remain present for the hearing of the matter, which is fixed on Admission Board though for the final hearing as per the previous orders of the Court, and lastly, this Court (Coram: Hon'ble Mr. Justice P.B. Majmudar) vide order dated 31st of March, 2004 expressed displeasure to the extent that respondents were not interested in proceeding with the matter. However, thereafter also the matter was adjourned in the interest of justice, vide order of this Court on 29th of April, 2004. The name of the respondent No.1 was corrected. Again, the said respondent on record was duly served, but none appeared. So, the matter was heard in their absence on merits. Learned Advocate Mr. Hriday Buch was heard on behalf of the petitioners.

2. This Revision Application is filed against an order passed by learned Extra Assistant Judge at Surendranagar on 28.2.2002 in Civil Misc. Appeal No. 70 of 1998 allowing the Appeal filed by the present respondents.

3. Short facts necessary to be noted are the present petitioners preferred Civil Regular Suit No. 96 of 1980 against one Zala Himmatsang Kanjibhai under the Bombay Rent Act for eviction of suit premises and for the arrears of rent. The said suit came to be dismissed by learned Civil Judge (JD) at Vadhwan, vide his judgment and decree dated 23.1.1984. Present petitioners being plaintiffs, preferred Civil Appeal No. 34 of 1984 in the District Court at Surendranagar, and vide judgment dated 8th of November, 1985, learned Assistant Judge, Surendranagar, allowed the above said Appeal and set aside the judgment and decree of the Trial Court dismissing the suit of the plaintiffs. The learned Assistant Judge further decreed the above said Regular Civil Suit No. 96 of 1980 and eviction as well as decree for the arrears of rent came to be passed by learned Assistant Judge, Surendranagar, vide above said order which is dated 8th of November, 1985. It appears that thereafter the matter was not carried further by original defendant of the suit Zala Himmatsang Kanjibhai.

4. Thereafter, the present petitioners through Managing Trustee filed an Execution Application to execute the decree passed by learned Assistant Judge and preferred a Civil Regular Execution Application No. 43/1996 against original defendant Zala Himmatsang

Kanjibhai. The said Execution Application was objected by the defendants vide Application Exh.18. The main objection which was taken against the execution was that in the original suit all the trustees were not joined and by virtue of the decision of this Court in the matter of Atmaram Ranchhodbhai vs. Gulam Husain Gulam Meyuddin, as reported in 13 GLR 828, the decree passed in Regular Civil Suit No.96 of 1980 was null and void, but that objections were overruled by the Executing Court, and Application Exh.18 filed by the judgment debtor came to be dismissed by the Executing Court, vide its order dated 10.9.1988. However, thereafter, original defendant appears to have expired and his legal heirs Gajraba Himatsang and Bhukhubha Himatsang filed Civil Misc. Appeal No.70 of 1998 in the District Court at Surendranagar against the order passed by the Executing Court on 10.9.1998 rejecting the application of original defendant Exh.18. Learned Extra Assistant Judge, Surendranagar, was pleased to allow the said Civil Misc. Appeal No. 70 of 1998 and the order passed below Exh.1 by Civil Judge (JD) at Vadhwan, Executing Court, in Civil Execution Application No. 43 of 1996 was quashed and set aside. However, in the final order passed by learned Extra Assistant Judge, Surendranagar, in Civil Misc. Appeal No.70/98, the order impugned of the Executing Court, as aforesaid, was set aside, but further order whether the objection application Exh. 18 filed by the original defendant was allowed or not was not passed by the learned Extra Assistant Judge, but going through the reasoning, it appears that since all the trustees were not joined, according to learned Extra Assistant Judge, in Regular Civil Suit, and that all the trustees in Execution Application were not joined, the decree could not have been executed.

5. Though it has been vehemently submitted by learned Advocate for the petitioners that the decree is not nullity firstly because all the trustees are not joined, and if at all, alternatively, all the trustees are not joined, the said dispute cannot be raised at execution stage, and that even if all the trustees are not joined as plaintiffs, would not result into deprivation of a jurisdiction of the Court to decide the issues which were raised under the Rent Act. Therefore, according to learned Advocate for the petitioner, firstly because even if for the sake of argument it is assumed that all the trustees were not joined as plaintiffs, the decree would not become nullity because the court still had jurisdiction to decide the issue raised in the said suit. The next contention was raised in respect of the jurisdiction of the appellate Court to allow the Civil

Misc. Appeal filed against an order passed by the Executing Court in Execution Application No. 43 of 1996.

6. Having regard to the contentions raised and going through the record, it clearly appears that the learned Extra Assistant Judge, Surendranagar, has exercised the jurisdiction which was never vested in him. Code of Civil Procedure provides expressly that no appeal shall lie on any decree or order unless provided for. Now, the order passed by the Executing Court below Exh. 1 in Execution Application No.43/96 is undoubtedly not a decree but an order. The Appeals From Orders are specifically provided for vide order 43 of the Code of Civil Procedure. Order 43 of the Civil Procedure Code provides for Appeal From Order in execution proceedings only against order under Rule 34, 72 and 92 of Order 21 of the Code of Civil Procedure. The order passed by the Executing Court in Execution Application No. 43 of 1996 made impugned in said Civil Misc. Appeal No.70 of 1998, undoubtedly, would not fall within Rule 37, 72 and Rule 92 of Order 21. Meaning thereby that no Appeal is provided by the Code of Civil Procedure against an order passed by the Executing Court below Application Exh.1 in Civil Execution Application No. 43 of 1996, resulting in exercising of a jurisdiction by Extra Assistant Judge, Surendranagar, which was never vested in him by law in passing order impugned in this Revision on 28.2.2002 allowing Civil Misc. Appeal No. 70 of 1998 and setting aside the order passed below Exh.1 Application by the Executing Court in Civil Execution Application No. 43 of 1996. Therefore, without entering into the first contention raised by the learned Advocate for the petitioners about whether decree was nullity or not, the Revision succeeds on this ground only.

7. In this view of the matter, this Revision Application is allowed. The order impugned in this Revision Application passed by learned Extra Assistant Judge, Surendranagar, on 28.2.2002 in Civil Misc. Appeal No. 70 of 1998 allowing the Appeal and setting aside the order passed by the Executing Court, is set aside and the Civil Misc. Appeal No.70 of 1998 stands dismissed because the same is not provided for by the Code of Civil Procedure and, therefore, was not maintainable at all. The consequence of allowing this Revision is, the order passed by the Executing Court below Execution Application Exh. No.1, rejecting the objections raised by the judgment debtor is restored and the Execution Application also stands restored. Rule is made absolute to the aforesaid extent only. No order as to costs.

(J.R. Vora, J.)

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